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9 KEMPER INDEPENDENCE INSURANCE
10 COMPANY

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KEMPER INDEPENDENCE
INSURANCE COMPANY, an Illinois
corporation,

Plaintiff,

v.

HOMELAND INSURANCE
COMPANY OF NEW YORK, a New
York corporation

Defendant.

Case No. 5:22-cv-05041

**COMPLAINT OF KEMPER
INDEPENDENCE INSURANCE
COMPANY FOR DECLARATORY
RELIEF; EQUITABLE INDEMNTY**

Plaintiff KEMPER INDEPENDENCE INSURANCE COMPANY
("KEMPER") for its Complaint for declaratory relief, equitable contribution, and
equitable indemnity alleges:

THE PARTIES

2 1. At all times herein mentioned, KEMPER was and is a corporation
3 organized and existing under the laws of the State of Illinois, with its principal
4 place of business in Jacksonville, Florida. KEMPER does not have a substantial
5 predominance of its corporate activities in the State of California. Its corporate
6 “nerve center” is in Jacksonville, Florida. Thus, KEMPER is a resident and citizen
7 of the State of Illinois, as well as of the United States.

8 2. At all times herein mentioned, defendant HOMELAND INSURANCE
9 COMPANY OF NEW YORK (“HOMELAND”) was and is a corporation
10 organized and existing under the laws of the State of New York, with its principal
11 place of business in New York. Thus, HOMELAND is a resident and citizen of the
12 State of New York, as well as of the United States.

JURISDICTION AND VENUE

14 3. This is an action for a declaratory judgment pursuant to 28 U.S.C. §
15 2201 and Rule 57 of the Federal Rules of Civil Procedure.

16 4. This Court has jurisdiction over the subject matter of this action
17 pursuant to 28 U.S.C. §1332(a)(1) in that the matter in controversy exceeds the sum
18 of \$75,000, exclusive of interest and costs, and is between citizens of different
19 states, in that KEMPER is an Illinois corporation with its principal place of
20 business in Jacksonville, Florida, and thus is a citizen of the State of Illinois,
21 whereas defendant HOMELAND is a citizen of the State of New York. The matter
22 in controversy exceeds the sum of \$75,000 based on the allegations in paragraphs
23 11 and 14 below.

FACTUAL BACKGROUND

The Accident

26 5. On June 7, 2014, Kyleean Cozzitorto Beltran was a passenger in an
27 American Sportsworks Trail Wagon TW400 4x2 utility vehicle driven by a minor
28 and suffered injuries and damages due to the alleged negligence various persons

1 and entities as alleged in an action entitled *Kyleean Cozzitorto Beltran, a minor*
2 *through her Guardian Ad Litem, Terri Copeland, plaintiff, v. Morgan Hill Unified*
3 *School District; Live Oak High School; Erin Larrus; Live Oak Safe and Sober*
4 *Grad Night, Inc.; Live Oak AG Boosters; Heidi Golden, and Does 1 to 50*, Santa
5 Clara County Superior Court Case No. 115CV276960, (“the Underlying Action”).
6 A true and correct copy of the Second Amended Complaint in the Underlying
7 Action is attached as Exhibit 1.

8 6. The events giving rise to the Underlying Action took place at Live Oak
9 High School (LOHS) in the City of Morgan Hill on the morning of June 7, 2014,
10 after overnight graduation festivities were held on campus for graduating students
11 sponsored by HOMELAND’s named insured, Live Oak Safe and Sober Grad Night,
12 Inc. That morning, parents, at least one teacher, students and other volunteers were
13 cleaning up inside and outside the school’s main gymnasium, as well as some
14 surrounding areas where activities had taken place.

15 7. Heidi Golden, a defendant in the Underlying Action, was one of the
16 volunteer workers on campus that morning performing cleanup services for Live
17 Oak Safe and Sober Grad Night, Inc., without compensation.

18 8. Students participating in the Future Farmers of America (“FFA”)
19 program maintained an area on LOHS’s property, referred to as “the farm,” where
20 they raised farm animals and grew crops. One of the pieces of equipment used on
21 the farm, as well as during certain other school functions, was a four-wheel utility
22 vehicle. Commonly known to students and others as the “Mule,” the utility vehicle
23 had space to seat people and carry cargo.

24 9. Among the LOHS students participating in the post-graduation
25 cleanup were Jessica Pfaundler, Casey Cowern, and Kyleean Cozzitorto Beltran, the
26 plaintiff in the Underlying Action. Pfaundler was 18 years old at the time. Cowern
27 was 14 years old. Beltran was 15 years old.

28

1 10. At one point during the cleanup, Pfaundler approached Heidi Golden.
2 Pfaundler asked if she could use the Mule. Heidi Golden gave Pfaundler
3 permission to use the Mule stating to Pfaundler, “You, and only you.” When Heidi
4 Golden gave Pfaundler permission to use the Mule, it was being used exclusively
5 for purposes of Live Oak Safe and Sober Grad Night, Inc.’s cleanup activities and
6 not for any purpose of the FFA.

7 11. After getting permission from defendant, Pfaundler went outside to the
8 Mule; she was joined by Beltran and Cowern. Shortly thereafter, Cowern asked
9 Pfaundler if she could try driving the Mule. Pfaundler agreed and the girls traded
10 seats. With Cowern at the wheel, the girls continued towards the farm. As Cowern
11 navigated a turn, the Mule flipped onto its side. All three girls were ejected from
12 the Mule, with Beltran ending up underneath it. Plaintiff sustained injuries as a
13 result which she is seeking to recover in the Underlying Action.

14 12. KEMPER is informed and believes, and on that basis alleges, that at
15 no time was the Mule owned by Heidi Golden.

The Policies

17 13. KEMPER has been defending Heidi Golden in the Underlying Action
18 since 2015 under Kemper Independence Insurance Company Policy Number RB
19 834217 issued to Mark and Heidi Golden for the policy period 12-29-2013 to 12-
20 29-2014 (“Kemper’s Policy”). The Mule was not a Covered Vehicle listed in the
21 Declarations to Kemper’s Policy.

22 14. KEMPER has incurred not less than \$200,000 in defense costs for the
23 defense of Heidi Golden in the Underlying Action as to which KEMPER had no
24 coverage obligation to Heidi Golden under Kemper's Policy and which should have
25 been paid by HOMELAND.

26 15. Defendant HOMELAND issued its Policy Number BW00003 to the
27 Education Support Purchasing Group for the policy period September 1, 2013, to
28 September 1, 2014 (“Homeland’s Policy”), a true and correct copy of which is

1 attached as Exhibit 2. On the Common Declarations Page of Homeland's Policy,
2 the Business Description of the Education Support Purchasing Group is "Education
3 and School related Associations including Parent Teacher Associations (PTA's),
4 Parent Teacher Organizations (PTO's) and Booster Clubs."

5 16. KEMPER is informed and believes, and on that basis alleges, that the
6 Education Support Purchasing Group is a Risk Purchasing Group, that is, a group
7 formed in compliance with the Risk Retention Act of 1986 authorizing a group of
8 insureds engaged in similar businesses or activities to purchase insurance coverage
9 from a commercial insurer.

10 17. KEMPER is informed and believes, and on that basis alleges, that on
11 June 7, 2014, and at all relevant times, Live Oak Safe and Sober Grad Night, Inc., a
12 California corporation, was an insured by HOMELAND. HOMELAND retained
13 and paid California legal counsel to defend Live Oak Safe and Sober Grad Night,
14 Inc., in the Underlying Action while wrongfully disclaiming coverage for Heidi
15 Golden.

16 18. Homeland's Policy provides under Section II – Who Is An Insured in
17 relevant part as follows:

18 1. If you are designated in the Declarations as:

19 ...
20 d. An organization other than a partnership, joint
21 venture or limited liability company, you are an
22 insured....
23 ...
24 2. Each of the following is also an insured:

25 a. Your "volunteer workers" only while performing
26 duties related to the conduct of your business However,
27 none of these "employees" or "volunteer workers" are insureds
28 for:
29

(1) “Bodily injury” or “personal and advertising injury”:

(a) To . . . your other “volunteer workers” while performing duties related to the conduct of your business.

19. The Homeland Policy defines Volunteer Worker as follows:

20. "Volunteer worker" means a person who is not your "employee", and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.

20. On July 6 and July 7, 2014, Heidi Golden was a “volunteer worker” for Live Oak Safe and Sober Grad Night, Inc., as that term is defined in Homeland’s Policy and she is, therefore, an insured under Homeland’s Policy as to the events giving rise to the Underlying Action. At all relevant times, HOMELAND has had a duty to defend Heidi Golden in the Underlying Action. As early as March 2015, demand was made that HOMELAND assume the defense of Heidi Golden in the Underlying Action and reimburse KEMPER for the defense costs incurred to date which should have been paid by HOMELAND. HOMELAND has rejected KEMPER’s demands and refused to defend Heidi Golden.

21. In support of its wrongful refusal to defend Heidi Golden in the Underlying Action, HOMELAND stated in a letter dated March 27, 2015, that the bodily injuries sustained by Beltran were bodily injuries to another “volunteer worker” of Live Oak Safe and Sober Grad Night, Inc.

22. On June 7, 2014, Beltran was not a “volunteer worker” for HOMELAND’S Named Insured, Live Oak Safe and Sober Grad Night, Inc., because, in return for their work on the cleanup, she and all other children

1 participating in the cleanup, had been promised that their expenses for presentations
2 at the upcoming county fair would be paid by the FFA booster's organization.

3 23. As a result, Heidi Golden was at all times entitled to coverage as a
4 “volunteer worker” for Live Oak Safe and Sober Grad Night, Inc. under
5 Homeland’s Policy because the injuries sustained by Beltran were not bodily
6 injuries to another “volunteer worker” of Live Oak Safe and Sober Grad Night, Inc.

FIRST CLAIM FOR RELIEF

8 (Declaratory Relief – Diversity Jurisdiction, 28 U.S.C. § 2201)

9 24. KEMPER refers to the foregoing paragraphs 1 through 23 and
10 incorporates the same herein by this reference.

11 25. An actual controversy has arisen, and now exists, between KEMPER
12 and HOMELAND in that KEMPER contends and HOMELAND denies that Heidi
13 Golden is entitled to a defense under Homeland’s Policy as to the Underlying
14 Action because on June 7, 2014, Heidi Golden was a “volunteer worker” for
15 HOMELAND’s named insured, Live Oak Safe and Sober Grad Night, Inc.,
16 performing duties related to the business of Live Oak Safe and Sober Grad Night,
17 Inc., which gave rise to the Underlying Action.

18 26. As a result, KEMPER seeks a declaration that HOMELAND has a
19 duty to assume the defense of Heidi Golden in the Underlying Action and to
20 reimburse KEMPER for the defense costs it has incurred for Heidi Golden which
21 should have been paid for by HOMELAND.

SECOND CLAIM FOR RELIEF

(Equitable Indemnity – Diversity Jurisdiction, 28 U.S.C. § 2201, and Supplemental Jurisdiction, 28 U.S.C. 1337(a))

25 27. KEMPER refers to the foregoing paragraphs 1 through 26 and
26 incorporates the same herein by this reference.

27 28. At all times, HOMELAND was obligated under Homeland's Policy to
28 defend and indemnify Heidi Golden as to the Underlying Action, but HOMELAND

1 wrongfully disclaimed any coverage obligation to Heidi Golden. As a result, and
2 without any obligation to do so under Kemper's Policy, KEMPER defended, and
3 continues to defend, Heidi Golden in the Underlying Action, at a cost not less than
4 \$200,000.

5 29. KEMPER is entitled to equitable indemnity from HOMELAND for all
6 defense costs incurred for the defense of Heidi Golden in the Underlying Action
7 which defense costs should have been borne by HOMELAND.

8 WHEREFORE, KEMPER prays for judgment as follows:

- 9 1. For a declaration that as the time of the accident giving rise to the
10 Underlying Action Heidi Golden was a “volunteer worker” for
11 HOMELAND’s named insured, Live Oak Safe and Sober Grad Night,
12 Inc., and HOMELAND has a duty to assume the defense of Heidi
13 Golden in the Underlying Action,

14 2. For judgment in favor of KEMPER and against HOMELAND for all
15 defense costs KEMPER has incurred for Heidi Golden in the
16 Underlying Action which should have been paid for by HOMELAND,
17 according to proof but believed to be not less than \$200,000, and

18 3. For such other and further relief as the Court deems appropriate.

WILLIAMS & WOLLITZ PC

By: /s/ Howard N. Wollitz
Howard N. Wollitz
Attorneys for Plaintiff
KEMPER INDEPENDENCE INSURANCE
COMPANY